Supreme Court, U.S.
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No. 05-72

In The
Supreme Court of the United States

DERRICK GOODWILL,

Petitioner,

v.

TEXAS A & M UNIVERSITY MEDICAL SCHOOL, RODERICK E. MCCALLUM, KATHLEEN WILLIAMS, BEN GREEN, and JOHN DOE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should Petitioner's timely filed appeal be dismissed for lack of jurisdiction because Petitioner's notice of appeal inadvertently contained an incorrect date of the judgment being appealed?

PARTIES TO THE PROCEEDING

Plaintiff-Appellant in the proceedings below was Derrick Goodwill (Petitioner).

Defendants-Appellees in the proceedings below were Texas A & M University Medical School, Roderick E. McCallum, Kathleen Williams, and Ben Green (Respondents).

OPINION BELOW

This is not a published case. The relevant judgments and orders issued by the Court have been included in the appendix to this brief.

JURISDICTION

Petitioner, Derrick Goodwill, urges the Court to take jurisdiction over this Petition and reinstate Petitioner's appeal in the Court below. Jurisdiction is appropriate under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

Relevant provisions of Federal Rules of Appellate Procedure 3 and 4 are reproduced in an appendix to this brief.

STATEMENT OF THE CASE

Petitioner, Derrick Goodwill, submits this Petition for Writ of Certiorari and Brief, and asks that the Court grant his Petition for Writ of Certiorari and reinstate Petitioner's appeal, and grant Petitioner any and all additional relief to which Petitioner might be entitled.

Petitioner is Derrick Goodwill. Respondents are Texas A&M University Medical School, Roderick E. McCallum, Kathleen Williams, and Ben Green. Petitioner sued Respondents on issues related to discrimination. This is a case involving Petitioner attempting to become a physician after being wrongfully dismissed from his fourth year of medical school, now making him ineligible for admission to other medical schools in this country.

On or about October 29, 2004, Petitioner received the District Court Magistrate Judge's memorandum and recommendation in the case, recommending that the Court grant Respondents' motion for summary judgment. On or about November 24, 2004, the Court accepted the Magistrate Judge's recommendation and entered final judgment in the case. On or about November 26, 2004, Petitioner, through counsel, timely filed a notice of appeal. The notice contained an inadvertent error akin to a typographical one

in the form of an incorrect date for the Judgment. The notice of appeal read as follows:

> "Plaintiff, Derrick Goodwill, serves notice that he wishes to appeal the Court's Judgment on Defendants' Motion for Summary Judgment in the above-referenced cause, entered October 29, 2004. Plaintiff hereby appeals to the United States Court of Appeals for the 5th Circuit."

Petitioner, through his notice of appeal, was appealing the Court's *Judgment* on Respondents' motion for summary judgment, and *not* the Magistrate Judge's recommendation. Petitioner properly identified the document he was appealing; however, the date of the document was in error. As part of their motion for new trial, counsel for Petitioner submitted affidavits to clarify this point. The date stated in the notice was inadvertent, but did not in any way preclude one from being able to identify what was being appealed from. The judgment on Respondents' motion for summary judgment was the only judgment issued in the case. Reinstating the appeal would not prejudice Respondents in that they were already on notice of the appeal and the briefing deadlines had not started.

REASONS FOR GRANTING THE WRIT

The Court should grant Petitioner's writ because of a conflict between the circuits created in this case when the Fifth Circuit declined to follow the well-established precedent. That is, the Courts have ruled that where notice of appeal was addressed to the final judgment, the mistake of a day in the designation of the date of its entry is immaterial, and the appeal is well taken. *Porter v. Borden's Dairy Delivery Company*, 156 F.2d 798 (C.C.A. Cal. 1946); *Wilson, et al. v. Southern RY Company*, 147 F.2d 165 (5th Cir. 1945); *Shannon, et al. v. Retail Clerks, International Protective Association, et al.*, 128 F.2d 553 (7th Cir. 1942); *Labiche v. Legal Sec. Life Insurance Company*, 31 F.3d 350, *rehearing denied*, 39 F.3d 322 (5th Cir. 1994). An appeal is not lost if a mistake is made in designating the judgment appealed from. *Ross v. Global Marine, Inc.*, 859 F.2d 336 (5th Cir. 1988). The Federal Rule of Appellate Procedure requiring

that a notice of appeal designate the judgment or order appealed from is to be broadly construed. *Matter of Trans-American Natural Gas Corporation*, 978 F.2d 1409 (5th Cir. 1993), *rehearing denied*, 983 F.2d 1060 (5th Cir. 1993). An error in designating the judgment from which an appeal is taken should not bar the appeal, where the intent to appeal the particular judgment can be fairly inferred and the opposing party is not prejudiced nor misled by the mistake. *Ibid.* As in the above cases, Petitioner's mistake as to the date of the judgment should not bar his appeal.

The Court's action in this case would deny due process and equal protection to many litigants and is therefore a matter of great import. The aggrieved litigants are typically minority or low-income litigants, and when such technicalities as are involved here are utilized they have a tendency to prevent these litigants access to the Courts where they have a right to attempt to redress their grievances. In this case, the Court's action infringed upon a property interest of Petitioner.

An appeal will not be dismissed for a mere technicality if the intent to appeal from a specific ruling can be fairly inferred, and the opposing party is not prejudiced. *Torres v. Oakland*, 487 U.S. 312, 316 (1988). In the case at hand, a Magistrate did not issue an order on the dispositive motion since the State had not agreed to permit the magistrate to handle the matter. The Magistrate was only empowered to make recommendations to the court and that is what the magistrate did. The recommendation does not say that it is an order, and hence one looking at the matter would not believe that this is what was being appealed from – even though the date on the Notice of Appeal was the same date on the Magistrate's Recommendation. The courts are to liberally construe what is intended as the order to be appealed from. *Forman v. Davis*, 361 U.S. 178, 181-182 (1962). Even if an order is mistakenly designated, the appellate court may nevertheless review other related parts if the intent to appeal related matters is clear from the record as a whole and the opposing party is not prejudiced thereby. *Polonski v. Trump Taj Mahal Associates*, 137 F.3d 139, 144-45 (3d Cir. 1998). It is significant in making the determination in regards to what was appealed from, if

there is only one judgment as there is in this case. *See Capital Parks v. Southeastern Advertising & Sales Systems, Inc.*, 30 F.3d 627, 630 (5th Cir. 1994).

This liberal construction of the rules has been applied in cases relating to the premature filing of notices of appeal. The Federal Rules of Appellate Procedure provide in Rule 4(a)(2) that "[a] notice of appeal filed after the court announces a discussion or order – but before the entry of the judgment or order – is treated as if filed on the date of and after the entry. This is similar to this case, except we have a better circumstance in that the notice of appeal was filed within the filing deadline, and after the court had entered its order adopting the magistrate's recommendation. The 5th Circuit has even provided that a case appealed improperly because there was no final order that was sent back to the district court on a motion to remand, was appealed properly pursuant to the initial notice of appeal that was prematurely filed and that a subsequently filed notice of appeal was a nullity. *Brown v. Mississippi Valley State University,* 311 F.3d 328 (5th Cir. 2002); and see also *Edmon v. Dallas County Sheriff's Department,* 2003 WL 21108526 (5th Cir. 2003); *Batieste v. U.S.,* 2004 WL 1284208; *Trufant v. Autocom, Inc.,* 729 F.2d 308, 309 (5th Cir. 1984); and *Cousin v. Small,* 325 F.3d 627 (5th Cir. 2003) [*in this case, the Court took jurisdiction over a prematurely filed notice*].

Once the court entered its judgment on the 24th of November and the Notice of Appeal was filed 2 days later from the only judgment granted in this case, the reasoning in *Brown* took over and the notice of appeal should have been deemed sufficient for all purposes. Petitioner's notice of appeal was filed within the 30-day time period, stated that it was an appeal to the judgment entered in the case, and properly identified the parties. A mistake as to the date of the only judgment entered in the case should not have barred Petitioner's appeal.

Even if one was to take the position that Petitioner's notice of appeal was not timely, the facts are clear that Petitioner has satisfied the standard for excusable neglect.

Thompson v. E.I. DuPont de Nemours & Company, 76 F.3d 530 (4th Cir. 1996); *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380 (1993). However, in this case, the issue relates to the sufficiency of the notice, not its timeliness, in *Thompson v. E.I. DuPont de Nemours & Company*, 76 F.3d 530 (4th Cir. 1996); *Bartnunck v. Bubak*, 941 F.2d 726 (8th Cir. 1991). Petitioner has established good cause in this case.

Left in tact, the decision of the 5th Circuit will frustrate the very purpose of the rules and years of historical precedent – besides depriving many deserving litigants of their day in court. There have been other instances where matters of procedure have been held to have Constitutional import. In *Becker v. Montgomery*, 532 U.S. 757, 121 S.Ct. 1801 (2001) the United States Supreme Court held that notices of appeal, even when they lack a signature or other technical problem, can be easily cured when brought to the attention of the attorney. In this case, the Court's rejection of the appeal was our first notice that there was concern about this matter, so the appropriate thing would have been for a request to be made that the correct date be inserted. Other cases such as *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) have held that an appeal was improperly dismissed when taking the record as a whole you could determine what was intended and that the notice may have been premature. The facts of this case are very similar to *Lemke v. U.S.*, 346 U.S. 325, 74 S.Ct. 1 (1953), and the court held that the appeal should be taken. In this case the appeal was not premature, but it was mailed two days prior to the entry of the judgment. However, it expressly referenced the court's judgment granting the motion for summary judgment as being appealed from, and there was only one summary judgment and one dismissal from a summary judgment.

CONCLUSION

For these reasons, Petitioner asks the Court to grant his petition for writ of certiorari and to reinstate Petitioner's appeal in the Fifth Circuit Court of Appeals. Also, Petitioner asks that the Court grant any and all further relief to which he might be entitled either in equity or at law.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20987

USDC No. 4:02-CV-88

DERRICK GOODWILL,

Plaintiff-Appellant,

versus

TEXAS A & M UNIVERSITY MEDICAL SCHOOL, RODERICK E. MCCALLUM, KATHLEEN WILLIAMS, BEN GREEN, and JOHN DOE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Feb. 9, 2005)

Before WIENER, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:

This court must examine the basis of its jurisdiction on its own motion if necessary. *Mosley v. Cosby,* 813 F.2d 659, 660 (5th Cir. 1987). In this civil rights case, the plaintiff, through counsel, filed a notice of appeal to this court from the "summary judgment" entered on October 29, 2004. The district court did not enter summary judgment on October 29, 2004; the memorandum and recommendation of the

magistrate judge was entered on that date. However, the memorandum and recommendation of the magistrate judge is not appealable to this court. *See United States v. Cooper,* 135 F.3d 960, 961 (5th Cir. 1998) (citing *Trufant v. Autocon, Inc.,* 729 F.2d 308, 309 (5th Cir. 1984)).

APPEAL DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DERRICK GOODWILL, Plaintiff	§ § §	
v.	§	CIVIL NO. H-02-0088
TEXAS A&M UNIVERSITY MEDICAL SCHOOL, RODERICK E. MCCALLUM, KATHLEEN WILLIAMS, BEN GREEN and JOHN DOE, Defendants.	§ § § § § § §	

MEMORANDUM AND RECOMMENDATION

(Filed Oct. 29, 2004)

Pending before the court[1] is Defendants' Motion for Summary Judgment (Docket Entry No. 56) and Plaintiff's Motion to Strike (Docket Entry No. 58). The court has considered both motions, all relevant filings, and the applicable law. For the reasons set forth below, the court **RECOMMENDS** that Plaintiff's Motion to Strike be **GRANTED IN PART** and **DENIED IN PART** and Defendants' Motion for Summary Judgment be **GRANTED**.

[1] This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Fed. R. Civ. P. 72. Docket Entry No. 19.

I. Case Background

Derrick Goodwill, an African-American male and former student at the Texas A&M College of Medicine ("College of Medicine"), filed this suit against the College of Medicine and three members of its faculty, alleging that he was wrongfully dismissed from its medical program in violation of 42 U.S.C. § 1981 ("Section 1981"), 42 U.S.C. § 1983 ("Section 1983"), Title VI of the Civil Rights Act of 1964 ("Title VI"), the Americans with Disabilities Act ("ADA"), and Texas state law.[2]

Plaintiff initially enrolled in the College of Medicine in 1996.[3] During Plaintiff's first two years of course work there, he satisfied all academic requirements.[4] His academic troubles began during his third year of medical school, in which he was required to take part in several clinical clerkships. After passing his first clerkship, he began his second clerkship, in Pediatrics, on August 17, 1998.[5] During that clerkship, Plaintiff noticed that he felt overly fatigued during the daytime and would often fall asleep during classroom lectures.[6] After undergoing tests, Plaintiff was told he either had narcolepsy or sleep deprivation syndrome.[7] His pulmonologist recommended that,

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[2] Plaintiff asserts claims under state law for civil conspiracy, breach of fiduciary duty, and intentional infliction of emotional distress.

[3] Affidavit of Kathleen M. Fallon, M.D., Docket Entry No. 56, Exhibit A ("Fallon Aff.") ¶ 3.

[4] *Id.* ¶¶ 5-7.

[5] *Id.* ¶¶ 9-10.

[6] Affidavit of Derrick Goodwill, Docket Entry 58, Exhibit 41 ("Goodwill Aff.") at 3.

[7] *See* Fallon Memorandum to File dated August 26, 1998, Docket Entry No. 58, Exhibit 21.

for the next three weeks, Plaintiff get at least eight hours of sleep per night.[8] Plaintiff requested, and was subsequently granted, a leave of absence to resolve his medical problems.[9]

After an approximately three-week leave of absence, Plaintiff returned to the program and began the Internal Medicine clerkship under the supervision of Ben Green ("Green"), the clerkship coordinator.[10] The Internal Medicine clinic is divided into six weeks of inpatient medicine and six weeks of outpatient medicine.[11] Plaintiff failed the inpatient portion.[12]

At a January 14, 1999, meeting held by the Student Promotions Committee ("SPC"), Green proposed a remediation plan requiring Plaintiff to retake the inpatient portion of the clerkship.[13] The SPC accepted the plan and placed Plaintiff on academic probation.[14] In a letter dated January 19, 1999, Kathleen Williams ("Fallon"[15]), the Assistant Dean of Student Affairs, notified Plaintiff of the SPC's decision and explained, "While on probation, any further failures may result in dismissal from medical

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[8] *Id.*

[9] Letter from Fallon to Michael Friedland, M.D., Vice-President for Health Affairs and Dean of Medicine, dated September 7, 1998, Docket Entry No. 58, Exhibit 20.

[10] Fallon Aff. ¶ 13.

[11] *Id.*

[12] *Id.*

[13] *Id.*; Affidavit of Ben Green, M.D., Docket Entry No. 56, Exhibit C. ("Green Aff.") ¶ 4.

[14] Green Aff. ¶ 4.

[15] Defendant Williams is now known as Kathleen Fallon.

school."[16] Plaintiff appealed his failing grade, complaining that his clinical evaluators neither gave him feedback nor told him he was in danger of failing the inpatient rotation.[17] After investigating Plaintiff's claims, Green confirmed that Plaintiff had not been given sufficient feedback and agreed to change his grade from an "F" to an "IP" (or "in progress") while Plaintiff retook the inpatient portion.[18] Nonetheless, Plaintiff remained on academic probation.[19]

Plaintiff passed his next clerkship, in General Surgery.[20] Even so, his instructors noted deficiencies in Plaintiff's ability to solve problems and reason in the clinical setting.[21] Therefore, the SPC imposed an additional requirement that Plaintiff complete an acting internship in General Surgery during his fourth year.[22] Plaintiff passed his next clerkship, in Psychiatry.[23]

After completing his Psychiatry clerkship, Plaintiff began the Family Medicine clerkship, which ran from May 10, 1999, through June 18, 1999.[24] In a letter dated July 18, 1999, Fallon notified Plaintiff that he had failed the Family Medicine clerkship and explained that members of

[16] Letter from Fallon to Plaintiff dated January 19, 1999, Docket Entry No. 23, Exhibit C-2.

[17] Green Aff. ¶ 5.

[18] *Id.* ¶ 6.

[19] *Id.* ¶ 7.

[20] Fallon Aff. ¶ 15.

[21] *Id.*; *see also* Plaintiff's Surgery Clerkship Grade Form, Docket Entry No. 56, Exhibit A-3.

[22] Fallon Aff. ¶ 15.

[23] *Id.* ¶ 16.

[24] *Id.* ¶ 17.

the SPC had expressed their concern about his difficulty solving problems and reasoning in the clinical setting.[25] Fallon also explained to Plaintiff that, pursuant to the remediation plan approved by the SPC, he was required to retake the Family Medicine clerkship and also undergo psychometric testing.[26] Fallon warned Plaintiff that "any further failures, while on probation, could result in expulsion."[27]

On June 28, 1999, Plaintiff began his Pediatrics clerkship, which had been delayed by his leave of absence.[28] He completed the clerkship on August 6, 1999, but did not receive a passing grade.[29] The Pediatrics department recommended a six-weeks remediation.[30] The SPC rejected this recommendation and, instead, voted to recommend to Roderick McCallum ("McCallum"), the Interim Dean of the College of Medicine, that Plaintiff be dismissed from the medical school for academic deficiencies.[31] McCallum accepted the SPC's recommendation and notified Plaintiff of his decision.[32] Plaintiff then appealed his failing grades from the Family Medicine and Pediatrics clerkships.[33] McCallum granted Plaintiff the right to

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[25] Letter from Fallon to Plaintiff dated July 8, 1999, Docket Entry No. 56, Exhibit A-7.

[26] *Id.*

[27] *Id.*

[28] Fallon Aff. ¶ 18.

[29] *Id.* ¶ 20.

[30] *Id.* ¶ 22.

[31] Affidavit of Roderick E. McCallum, Ph.D., Docket Entry No. 56, Exhibit B ("McCallum Aff.") ¶ 3.

[32] *Id.* ¶ 4; Letter from McCallum to Plaintiff dated September 9, 1999, Docket Entry No. 56, Exhibit B-l.

[33] McCallum Aff. ¶ 8.

appeal and appointed two separate committees to consider the appeals.[34] Both committees upheld the failing grades and McCallum affirmed the decisions.[35]

In a letter dated January 10, 2000, McCallum declined to grant Plaintiff an appeal of his dismissal from the school.[36] McCallum wrote to Plaintiff, "After discussion with faculty and careful consideration, I feel that the issues you raised were addressed at the two grade appeal hearings or represent a misunderstanding of school policy on your part."[37]

Plaintiff filed this lawsuit on January 10, 2002.[38] He amended his complaint on May 24, 2002.[39] On July 30, 2002, the Defendants moved for summary judgment on all of Plaintiff's claims except his Title VI claim against the College of Medicine and his ADA claim against McCallum.[40] The undersigned magistrate judge recommended the motion be granted in part and denied in part, and the district court subsequently adopted this recommendation.[41] The result

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[34] *Id.* ¶¶ 8-9; Letter from McCallum to Plaintiff dated November 9, 1999, Docket Entry No. 56, Exhibit B-4.

[35] McCallum Aff. ¶ 9; Letters from McCallum to Plaintiff dated November 24, 1999, Docket Entry No. 56, Exhibit B-5.

[36] Letter from McCallum to Plaintiff dated January 10, 2000, Docket Entry No. 56, Exhibit B-7.

[37] *Id.*

[38] Plaintiff's Original Complaint, Docket Entry No. 1.

[39] Plaintiff's Amended Original Complaint, Docket Entry No. 20 ("Amended Complaint").

[40] Defendants' Motion for Partial Summary Judgment, Docket Entry No. 23.

[41] Memorandum, Recommendation and Order, Docket Entry No. 33 ("MRO"); Order Adopting Magistrate Judge's Memorandum and Recommendation, Docket Entry No. 35.

was that the court granted summary judgment in the Defendants' favor on Plaintiff's Section 1981 and Section 1983 claims, Title VI claim against the individual Defendants, and state law claims against the College of Medicine.[42] The motion was denied as to Plaintiff's ADA claim and state law claims against the individual Defendants.[43] Additionally, the court lifted the existing stay on discovery to give Plaintiff an opportunity to ascertain information relevant to his remaining causes of action.[44]

Thus, Plaintiff has several claims pending: a Title VI claim asserted against the College of Medicine, ADA claims against the Defendants, and state law claims against the individual Defendants.

On April 5, 2004, per court order, Defendants moved for summary judgment on these remaining claims.[45] Plaintiff responded in kind and also moved to strike portions of Defendants' summary judgment evidence.[46] The court now considers both motions.

II. Motion to Strike

Plaintiff moves to strike part of Defendants' summary judgment evidence. He first argues that the affidavits of Fallon, McCallum, and Green contain inadmissible

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[42] MRO at 34.

[43] *Id.*

[44] *Id.*

[45] Defendants' Motion for Summary Judgment With Brief in Support, Docket Entry No. 56 ("Motion for Summary Judgment").

[46] Brief in Support of and Response to Defendants' Motion for Summary Judgment and Motion to Strike, Docket Entry No. 58 ("Plaintiff's Response" and "Motion to Strike").

hearsay, statements not made on personal knowledge, legal conclusions, expert opinions without proper foundation, and statements that violate the best evidence rule.[47] As an initial matter, the court notes that Plaintiff raised some of these same objections earlier, as part of his response to Defendants' motion for partial summary judgment. The court overruled those objections then and finds no reason to deviate from that determination now. Thus, to the extent Plaintiff merely repeats the same objections he made previously, those objections are **OVERRULED**.

With that said, the court recognizes that many of Plaintiff's objections to statements contained in the affidavits are dissimilar to those he raised previously. The court has considered the new objections and finds them largely devoid of merit. However, the court does find merit with Plaintiff's objection to statements made by Fallon, McCallum, and Green in their affidavits that Plaintiff was afforded full "due process" in connection with his dismissal. To the extent these statements are legal conclusions, the court agrees they should be stricken from the record. These particular objections are, therefore, **SUSTAINED**. All other objections to the these affidavits are **OVERRULED**. Plaintiff also objects to certain exhibits attached to the affidavits.[48] The court finds no merit to

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[47] Plaintiff incorrectly cites the Best Evidence Rule as Federal Rule of Evidence 106. In actuality, this rule is found in Federal Rule of Evidence 1002, which requires production of the original writing to prove the contents of that writing.

[48] Plaintiff makes three objections to the exhibits. First, he objects to Exhibit A-9 (the report of Louis A. Gamine, Ph.D., setting forth the results of Plaintiff's psychometric testing) on the grounds that its disclosure violates the physician-patient privilege. This objection is without merit. Here, the relevance of Dr. Gamino's report is confined to the issue of whether Plaintiff possessed a disability, i.e., it would only

(Continued on following page)

these objections and, therefore, they are **OVERRULED**. Accordingly, Plaintiff's motion should be **GRANTED IN PART and DENIED IN PART.**[49]

III. Summary Judgment Standard

The standards for summary judgment under federal law are well established. Summary judgment is warranted only when the evidence before the court fails to raise any genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute is

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be relevant to Plaintiff's federal ADA claim. It is well-settled, however, that no physician-patient privilege exists under federal law. *Gilbreath v. Guadalupe Hosp. Found., Inc.*, 5 F.3d 785, 791 (5th Cir. 1993). Thus, although a physician-patient privilege does exist under Texas law, *see* Texas Rule of Evidence 509, that privilege is irrelevant in this instance because state law is not implicated.

Next, Plaintiff objects to Exhibits D-2 and D-3 (the June 1997 and June 1998 Student Handbooks) because they are incomplete, and to Exhibits D-2, D-3, D-4, and D-5 (Student Handbooks from June 1997 through December 1999) because they are irrelevant. This objection is overruled as well. First, the court finds that Defendants were under no obligation to submit the entire text of each Student Handbook. Under the rule of optional completeness stated in Federal Rule of Evidence 106, if Plaintiff believed the omitted pages were material, he had the option to supplement the record with those pages. Second, the court is hard-pressed to understand how the Student Handbooks could be considered irrelevant. They set out the applicable procedures and guidelines for grading, remediation, leaves of absence, grade appeals, academic probation, and academic dismissal, all issues that are relevant to the claims in this lawsuit.

Finally, Plaintiff objects to "any hearsay contained within the documents" attached to the affidavits of Fallon and McCallum. This vague and generalized objection simply does not merit consideration by the court.

[49] The specific objections the court will sustain are: In (in part), 1s, 2a, 2f, and 6 (in part, as it pertains to ¶ 9 of Dr. Green's Affidavit).

"genuine" if the evidence would permit a reasonable jury to return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *TIG Ins. Co. v. Sedgwick James of Washington*, 276 F.3d 754, 759 (5th Cir. 2002). A fact is "material" if the relevant substantive law identifies it as one that might reasonably affect the outcome of the case. *Liberty Lobby*, 477 U.S. at 248; *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 271 F.3d 624, 626 (5th Cir. 2001).

The movant must inform the court of the basis for a grant of summary judgment by identifying relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, and affidavits on file, that demonstrate the absence of genuine issues of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp.*, 477 U.S. at 323; *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). If the moving party satisfies its burden, the adverse party must go beyond the pleadings and produce competent evidence which demonstrates that genuine issues of material fact exist that must be resolved by a trier of fact. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. The adverse party, however, must show more than "some metaphysical doubt as to the material facts" to withstand summary judgment. *Meinecke v. H & R Block of Houston*, 66 F.3d 77, 81 (5th Cir. 1995). Conclusory statements, speculation, and unsubstantiated assertions are not sufficient to raise material fact issues for trial. *TIG Ins.*, 276 F.3d at 759. When deciding whether the evidence creates a genuine issue of material fact, the court resolves all doubts and draws all justifiable inferences in favor of the party opposing the motion. *Liberty Lobby*, 477 U.S. at 255; *Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 190 (5th Cir. 2001).

IV. Legal Analysis

A. Title VI

Plaintiff asserts a claim against the College of Medicine under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits racial discrimination in the administration of federally funded programs. In its motion for summary judgment, the College of Medicine contends it is entitled to summary judgment on this claim because Plaintiff is unable to demonstrate that his race was a motivating factor in the decision to dismiss him from the medical school.

Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Therefore, to prevail on a Title VI claim, a plaintiff must show that the defendant: (1) received funding from the federal government; and (2) engaged in intentional discrimination on the basis of race, color, or national origin. 42 U.S.C. § 2000d; *see also Alexander v. Sandoval,* 532 U.S. 275, 280 (2001). Here, the first prong is satisfied, as it is undisputed that the College of Medicine receives federal financial assistance and is, therefore, subject to Title VI's prohibition against discrimination.[50] Thus, the critical inquiry is whether the College of Medicine intentionally discriminated against Plaintiff on the basis of his race, color, or national origin.

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[50] Motion for Summary Judgment at 13.

Whether Plaintiff can show intentional discrimination in this instance is determined using the burden-shifting scheme set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 93 (1973).[51] *See Freeman v. Fahey*, 374 F.3d 663, 666 (8th Cir. 2004) (applying *McDonnell Douglas* test to a Title VI claim); *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin County, Okla.*, 334 F.3d 928, 929-30 (10th Cir. 2003) (same); *Baldwin v. Univ. of Tex. Med. Branch at Galveston*, 945 F. Supp. 1022, 1031-34 (S.D. Tex. 1996) (same).

Under the *McDonnell Douglas* analytical framework, a plaintiff must first establish a prima facie case of discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002). If the plaintiff succeeds in doing so, a presumption of discrimination arises, and the burden shifts to the defendant to produce a legitimate, nondiscriminatory reason for its alleged discriminatory action. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981); *Price*, 238 F.3d at 720. If the defendant satisfies its burden, the presumption of discrimination disappears, and the plaintiff must then prove the defendant's proffered reason is not true but, rather, a mere pretext for intentional discrimination. *Reeves*, 530 U.S. at 142-43; *Price*, 238 F.3d at 720.

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[51] Plaintiff, citing *Pryor v. NCAA*, 288 F.3d 548 (3rd Cir. 2002), contends that an altogether different burden-shifting analysis is applicable to his Title VI claim. In *Pryor*, the plaintiff alleged that the NCAA violated Title VI by adopting a policy with the intent of discriminating against black athletes. In the case at bar, Plaintiff does not specify a particular policy that he believes the College of Medicine enacted with discriminatory motives. As a result, the burden-shifting standard set out in *Pryor* is inapplicable.

In the Title VII employment context, a plaintiff can establish a prima facie case of discrimination by showing that he: (1) is a member of a protected class; (2) was qualified for his position; (3) was subjected to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, shows that similarly situated employees not members of his protected class were treated more favorably. *Bryan v. McKinsey & Co.*, 375 F.3d 358, 360 (5th Cir. 2004); *Okove v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512 (5th Cir. 2001). However, as Plaintiff's claim arose out of the academic context setting and does not concern employment, the elements of the prima facie case must be altered to fit the factual situation at hand. *See Burdine*, 450 U.S. at 254 n.6 (noting that the prima facie model set forth in *McDonnell Douglas* is not inflexible and may be tailored to fit the particular factual scenario). As an African-American, Plaintiff falls within a class protected by Title VI. He was admitted to the College of Medicine, studied in its medical program for over three years, and was subjected to an adverse action, i.e., dismissal.

The court stops to note that only Plaintiff's dismissal is actionable. In the court's view, Title VI's protections do not extend to redressing below average grades or being placed on academic probation. Applying the Title VII requirement of an "ultimate employment action" to the academic setting, the court finds that Title VI's private right of action only reaches those "ultimate academic decisions" such as dismissal or suspension. *Cf. Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (only "ultimate employment decisions" qualify as adverse employment actions to establish a prima facie case of

discrimination or retaliation); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) ("Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions").[52]

To make out his prima facie case, Plaintiff must also adduce some amount of evidence that he was treated differently than similarly situated medical students who were not members of his protected group. *See Okove v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001). To make this showing, Plaintiff alleges that other medical students failed the entire first year of medical school but were permitted to repeat.[53] Even if the court were to consider the first and third years of medical school to be academically comparable, which it does not, Plaintiff has failed to allege these similarly situated students were members of a different racial class. As such, Plaintiff cannot satisfy the fourth element of his prima facie case and his claim must fail.

However, even assuming Plaintiff had established a prima facie case, he is still required to demonstrate that the College of Medicine's proffered explanation for dismissing him is false or merely a pretext for intentional discrimination based on his race. *See Reeves*, 530 U.S. at 143. The College of Medicine explains that Plaintiff was dismissed because he failed three separate clinical clerkships.

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[52] In addition to his dismissal from the College of Medicine, Plaintiff also complains about the two academic probationary periods on which he was placed prior to his dismissal. The court will discuss those two probationary periods for background purposes only.

[53] Amended Complaint ¶¶ 25, 32; Plaintiff's Response at 16-17.

To prove that this explanation is a pretext for racial discrimination, Plaintiff contends that he was dismissed only because the individuals who gave him failing grades or participated in the dismissal proceedings were racially biased.

Plaintiff first focuses his attention on the Internal Medicine clerkship. He alleges that Lawrence Barenholtz, M.D., one of several physicians who evaluated him, held a bias against African-Americans.[54] As evidence of such, Plaintiff submits the affidavit of Jacqueline McClanahan, a registered nurse who worked at the same hospital location as Dr. Barenholtz."[55] McClanahan testified that Dr. Barenholtz picked on Plaintiff, attributed to him mistakes made by white students, assigned him the most difficult patients to work with, and, on one occasion, made a racially offensive comment to Plaintiff.[56] She further testified that, in her opinion, Dr. Barenholtz had "a serious racial bias against African-Americans,"[57] Plaintiff contends that the actions taken by Dr. Barenholtz caused him to be placed on probation and that "this probation drove everything that happened after that."[58]

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[54] Plaintiff's Response at 24.

[55] Affidavit of Jacquelyn McClanahan, R.N., Docket Entry No. 58, Exhibit 37 ("McClanahan Aff.").

[56] *Id.* ¶ 4. With regard to the comment, McClanahan testified that Dr. Barenholtz asked Plaintiff where he got his eye color. When Plaintiff responded that he got it from his mother or father, Dr. Barenholtz allegedly responded that he did not think so "because black people did not have eyes like that." *Id.*

[57] *Id.*

[58] Plaintiff's Response at 24.

Much of the content of Ms. McClanahan's testimony is objectionable as hearsay, speculation or improper opinion testimony and must be disregarded by the court as incompetent summary judgment evidence. However, irrespective of whether Dr. Barenholtz held a racial bias, the evidence shows that he did not give Plaintiff a failing grade in the Internal Medicine clerkship. Like other evaluating physicians, Dr. Barenholtz was required to fill out clinical evaluation forms. Students were graded in five areas: (1) data gathering, recording, and presentation; (2) medical knowledge; (3) problem solving and clinical reasoning; (4) interpersonal skills; and (5) professional attributes.[59] The evaluator could choose from several terms to describe the student's performance: outstanding, above expected, expected, passable, and unsatisfactory.[60] The syllabus for the clerkship provided that a student failed the clerkship only if he received one or more marks of "unsatisfactory."[61]

On his clinical evaluation form, Dr. Barenholtz gave Plaintiff four "passable" marks and one "expected" mark.[62] He explained that Plaintiff had "trouble organizing his thinking and focusing in on the problems," "takes too long

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[59] *See* Docket Entry No. 58, Exhibit 29 (clinical evaluation forms for the Internal Medicine clerkship).

[60] *Id.* "Expected" meant the student's performance was up to that expected of a student at that stage of his education; "passable" meant the student's performance was less than expected, but not below that required, at that stage of education; and "unsatisfactory" meant the performance was inadequate and fell below that required. *Id.*

[61] The syllabus for the Internal Medicine clerkship provided: "*Any* unsatisfactory evaluation in even a single component of your clinical evaluations will result in failure of the Clerkship." (emphasis in original). Docket Entry No. 58, Exhibit 2 at 14.

[62] Dr. Barenholtz Clinical Evaluation Form, Docket Entry No. 58, Exhibit 29.

to get through an encounter," and "has trouble in prioritizing the differential diagnosis."[63] He also indicated that Plaintiff was not a strong candidate for a residency in Internal Medicine.[64] Even though Dr. Barenholtz's comments indicated that he believed Plaintiff to be a borderline student, he nonetheless gave him a passing grade in the clerkship. Plaintiff's contention that Dr. Barenholtz's alleged racial bias was a causal factor in his dismissal is simply not supported by the record.

Next, Plaintiff alleges that one of the evaluating physicians in his Family Medicine clerkship, Michael Kirkpatrick, M.D., held a racial bias against African-Americans.[65] To substantiate this claim, Plaintiff submits the affidavit of Cathy Falkner, a former resident in Internal Medicine who worked with Dr. Kirkpatrick.[66] Falkner testified that on the basis of her extensive interaction with Dr. Kirkpatrick during her residency, she concluded that he possessed a serious racial bias that made it "impossible for him to adequately and fairly judge an African-American."[67] She also stated that "it was common knowledge among the medical staff that Dr. Kirkpatrick was racially biased."[68] Most of Ms. Falkner's testimony is inadmissible and cannot be considered by the court as competent summary judgment evidence. She is limited to her personal observations, not her speculation concerning Dr. Kirkpatrick's personal motivations.

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[63] *Id.*

[64] *Id.*

[65] Plaintiff's Response at 25.

[66] Affidavit of Cathy Falkner, Docket Entry No. 58, Exhibit 38.

[67] *Id.* ¶ 3.

[68] *Id.*

Dr. Kirkpatrick filled out three clinical evaluation forms during Plaintiff's five-week long Family Medicine clerkship. On the first clinical evaluation, Dr. Kirkpatrick gave Plaintiff three "passable" marks and two marks of "unsatisfactory."[69] Like Dr. Barenholtz, Dr. Kirkpatrick found that Plaintiff had problems with his medical knowledge and ability to solve problems in the clinical setting. He explained on this form that Plaintiff "tries hard but appears to have a poor fund of knowledge," "is very unsure when presenting," and "has difficulty synthesizing patient complaints into problems."[70]

On the second evaluation, Dr. Kirkpatrick gave Plaintiff two "expected" marks, two "passable" marks, and one "unsatisfactory" mark. Plaintiff received a higher mark in each area tested, with the exception of "medical knowledge."[71] Dr. Kirkpatrick explained that Plaintiff had shown some improvement in his ability to formulate treatment plans, but still needed to improve his fund of knowledge and basic clinical skills.[72]

On his final evaluation form, Dr. Kirkpatrick gave Plaintiff three marks of "passable" and two marks of "unsatisfactory."[73] He noted that Plaintiff had disjointed presentations, had difficulty processing patient remarks into a working differential diagnosis, and still showed a

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[69] Dr. Kirkpatrick Evaluation Form for May 12, 1999, through May 21, 1999, Docket Entry No. 56, Exhibit A-6.

[70] *Id.*

[71] Dr. Kirkpatrick Evaluation Form for May 24, 1999, through June 4, 1999, Docket Entry No. 56, Exhibit A-6.

[72] *Id.*

[73] Dr. Kirkpatrick Evaluation Form for June 7, 1999, through June 18, 1999, Docket Entry No. 56, Exhibit A-6.

weak fund of knowledge.[74] He also commented that, although Plaintiff had shown improvement in the final week, he "was still below the level expected for [third year] students in the latter part of the year."[75] On the basis of these evaluations, Dr. Kirkpatrick gave Plaintiff a failing grade in the clerkship.

As with the prior clerkship, Plaintiff has failed to raise a fact issue that Dr. Kirkpatrick's alleged racial bias, on which there is precious little competent evidence, rather than Plaintiff's below-standard performance, was the cause of his dismissal. As the Supreme Court has made clear, "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148. This is one of those instances. First, Dr. Kirkpatrick's critiques of clinical performance were corroborated by the other attending physicians in the Family Medicine clerkship.[76] Plaintiff

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[74] *Id.*

[75] *Id.*

[76] *See* Family Medicine Progress Report of Derrick Goodwill, Docket Entry No. 56, Exhibit A-6 (summarizing Plaintiff's performance in the Family Medicine clerkship and stating, "This report was discussed with all of the Senior Staff physicians who worked with Student Doctor Goodwill, and they are in agreement with the grade. These include Dr.'s Gerdes, Patel, Averitt, and O'Neal."); Letter from Dr. Michael O'Neal dated November 15, 1999, Docket Entry No. 56, Exhibit A-6 (stating that Plaintiff's "integration of [patient] information, in terms of a differential diagnosis, often proved difficult"); Letter from Dr. Parita Patel dated November 5, 1999, Docket Entry No. 56, Exhibit A-6 (stating that Plaintiff's "history taking and case presentations were not as detailed or as complete as one would expect from an average third year student," that "his physical examinations were cursory at best"

(Continued on following page)

does not allege that these physicians held a bias against African-Americans. Second, Plaintiff's failing grade in the Family Medicine clerkship did not result in his dismissal from the College of Medicine. To the contrary, Plaintiff remained on probation and was merely required to undertake a second remediation.[77] Plaintiff was not dismissed until he failed his third clerkship, in Pediatrics.

Plaintiff does not assert that his failing grade in Pediatrics was a result of racial bias, but rather that Defendant Fallon exhibited racial animus toward him when he appealed his failing grade. He claims Fallon was "harsh and rude," "gave him bad information," and "prevented his representative, an African-American faculty member, from participating in the appeals process."[78] Plaintiff also submits the affidavit of Babu Paladagu, a former medical student at the College of Medicine, who opined that Fallon had "racial and ethnic biases."[79] Paladagu's conclusory statement is inadmissible and cannot be considered by the court. Even assuming that Fallon was rude to Plaintiff or gave him wrong information regarding the grade appeal process, this conduct does not provide even a scintilla of evidence that Fallon orchestrated his dismissal from the College of Medicine on the basis of his race. Moreover, Plaintiff's claim that Fallon prevented him from having his representative, Haywood Robinson,

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and that he argued with Dr. Patel about the necessity of performing a particular examination).

[77] As with the prior clerkship rotation, the court does not consider this probationary status to be actionable under Title VI because it was not an ultimate academic decision.

[78] Plaintiff's Response at 25-26.

[79] Affidavit of Babu Paladagu, Docket Entry No. 58, Exhibit 39 ¶ 3.

M.D., in attendance at the grade appeal meetings, also fails to create a fact issue on this point.

Finally, Plaintiff asserts that Defendant McCallum exhibited racial bias by upholding the SPC's recommendation to dismiss him. Plaintiff's unsubstantiated assertion that McCallum discriminated against him is not supported by any evidence in the record. To the contrary, the evidence shows that McCallum took extra measures to ensure that Plaintiff's voice was heard: he sent several written letters to Plaintiff reminding him that he could appeal his dismissal, excused the fact that Plaintiff's appeal was untimely, and considered the merits of Plaintiff's appeal before deciding it was without merit.[80]

In sum, even if the court were to find Plaintiff established a prima facie case of discrimination, he fails to prove the College of Medicine's explanation is pretextual. A rational trier of fact could not find that Plaintiff was dismissed for any reason other than his continued below-satisfactory performance after two probationary periods. In reaching this conclusion, the court was especially mindful of the Supreme Court's instruction in *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), that courts should always be extremely hesitant to override the judgment of an academic institution:

> When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that

[80] McCallum Aff. ¶¶ 10-11.

> the person or committee responsible did not actually exercise professional judgment.

Id. at 225; *see also Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring) ("University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation."); *Ku v. Tennessee*, 322 F.3d 431 (6th Cir. 2003) (applying deferential standards in favor of academic institutions to a Section 1983 discrimination claim); *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (1st Cir. 1991) (same result in a Rehabilitation Act case); *Hankins v. Temple Univ.*, 829 F.2d 437 (3rd Cir. 1987) (Title VII case).

Although the court accepts that Plaintiff truly believes he was discriminated against by the College of Medicine and some of its faculty members, Plaintiff's subjective perception of discrimination cannot defeat summary judgment. *See Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309, 313 (5th Cir. 1999). Instead, the undisputed evidence shows that Plaintiff exhibited insufficient skills in the clinical setting over an extended period of time, consistently was graded poorly by numerous faculty members in the skill areas of medical knowledge, problem solving and clinical reasoning, and failed to comply with the terms of his academic probation. The court finds no reason, from the evidence before it, to question the College of Medicine's decision to dismiss Plaintiff. Accordingly, Defendants' motion for summary judgment should be granted on Plaintiff's Title VI claim.

B. Americans with Disabilities Act

Plaintiff next asserts a claim under the ADA for disability-based discrimination. More specifically, he

argues that Defendants treated him differently than other students who did not have his disability and failed to reasonably accommodate his disability. Defendants contend that Plaintiff has no actionable claim because he does not have a "disability" within the meaning of the ADA.

Plaintiff's claim arises under Title II of the ADA, 42 U.S.C. §§ 12131-12165, which prohibits discrimination on the basis of disability in public services, programs, and activities.[81] Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* § 12132.

As with Title VI, the court utilizes the familiar *McDonnell Douglas* burden-shifting framework to analyze Plaintiff's ADA claim. *See Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 511 (5th Cir. 2003); *Seaman v. CSPH, Inc.*, 179 F.3d 297, 300 (5th Cir. 1999). To make out a prima facie case of discrimination under Title II of the

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[81] Plaintiff incorrectly frames his claim for relief as one arising under Title I of the ADA. The ADA "forbids discrimination in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III." *Tennessee v. Lane*, 124 S.Ct. 1978, 1984 (2004). Plaintiff does not maintain he has an employment relationship with the College of Medicine. As a result, Title I does not govern his claim. Instead, Title II is applicable because the College of Medicine is a division of the Texas A&M University System, which, in turn, is a "public entity" that provides public programs and activities. *See* 42 U.S.C. § 12131(1)(B) (defining public entity to include a state agency); *Texas A&M Univ. v. Bishop*, 105 S.W.3d 646, 652 (Tex. App. – Houston [14th Dist.] 2002, pet. granted) (noting that Texas A&M University is a state agency).

ADA, Plaintiff must demonstrate: (1) he is a qualified individual within the meaning of the ADA; (2) he was excluded from participation in, or denied benefits of, services, programs, or activities for which Defendants are responsible, or otherwise was discriminated against by Defendants; and (3) that such exclusion, denial of benefits, or discrimination was by reason of his disability. *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 428 (5th Cir. 1997); *see also Melton v. Dallas Area Rapid Transit*, 326 F. Supp. 2d 767, 771 (N.D. Tex. 2003).

Defendants challenge Plaintiff's ability to prove the first element, i.e., that he is entitled to protection under the ADA as a "qualified individual with a disability." *See* 42 U.S.C. § 12132. The statute defines such an individual as one "with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2). Defendants contend that Plaintiff cannot meet this definition because he does not have a disability.

"As a threshold requirement in an ADA claim, the plaintiff must, of course, establish that he has a disability." *Waldrip v. Gen. Elec. Co.*, 325 F.3d 652, 654 (5th Cir. 2003) (quoting *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 758 (5th Cir. 1996)). Title II's implementing regulations define "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."

28 C.F.R. § 35.104.[82] As the regulation makes clear, merely having an impairment does not make a claimant disabled under the ADA. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195 (2002). Instead, the claimant must also show that the impairment places a substantial limitation on at least one major life activity. *Id.* "Major life activities" are those that are of "central importance to daily life." *Id.* at 197. Specific examples include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 35.104.

The parties do not dispute that Plaintiff was evaluated for sleep apnea while he was a student at the Medical School and that sleep apnea is a physical impairment. The critical issue is whether the sleep apnea substantially limited any of his major life activities. To make this showing, Plaintiff must adduce "evidence that the extent of the limitation in terms of [his] own experience . . . is substantial." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

Although the Title II regulations do not contain a definition of the term "substantially limits," regulations promulgated by the EEOC to effectuate Title I of the ADA afford significant guidance. According to the EEOC regulations, the term "substantially limits" means: (1) unable to

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[82] A "physical impairment" is defined as "[a]ny physiological disorder or condition, . . . affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine." 28 C.F.R. § 35.104. A "mental impairment" is "[a]ny mental or psychological disorder. . . ." *Id.*

perform a major life activity that the average person in the general population can perform; or (2) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.2(j) (1) (i)-(ii). The regulations set forth several factors a court should consider when determining whether an individual is substantially limited in a major life activity: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. *Id.* § 1630.2(j) (2) (i)-(iii).

Plaintiff asserts that his sleep apnea substantially limited his ability to sleep and, consequently, concentrate and learn while he was a medical student.[83] For purposes of this opinion, the court assumes that each of these functions is a "major life activity" as contemplated by the ADA. *See Heisler v. Metro. Council*, 339 F.3d 622, 628 (8th Cir. 2003) (holding that sleeping and concentrating are major life activities); *Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 316 (6th Cir. 2001) (sleeping); 28 C.F.R. § 35.104 (learning). Thus, the court mut determine whether Plaintiff's sleep apnea substantially limited his ability to perform any of these activities.

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[83] More precisely, he contends that the sleep apnea prevented him from "attaining REM level of sleep" and, thus, caused him to experience the effects of severe sleep deprivation, such as an inability to concentrate and learn while at school. Plaintiff's Response at 30. He also avers that the medication he took to control the problem caused him to "drift off at unexpected times." *Id.*

Plaintiff first contends the sleep apnea substantially limited his ability to sleep. The evidence in the record does not support this contention. Plaintiff testified in his affidavit that, at the beginning of his Pediatrics clerkship, he became aware that he was not functioning normally.[84] Specifically, he had a low energy level and "excessive somnolence" during the daytime.[85] He sought help from Fallon, who subsequently referred him to Dr. Perez-Guerra, a pulmonologist.[86] During his evaluation, Dr. Perez-Guerra asked Plaintiff about his sleep patterns. Plaintiff replied that he only slept about four hours each weekday night because he had to study late at night.[87] Dr. Perez-Guerra suggested to Plaintiff that he sleep more during the weekdays and leave a larger portion of his studying for the weekends.[88] Plaintiff rejected this idea, telling Dr. Perez-Guerra it was not a viable option because his weekends were spent taking care of "personal matters not related to school," such as "cleaning my house, cleaning my clothes and folding them, and various other essential matters that required time to complete.[89] He explained to Dr. Perez-Guerra that, although he "did do substantial [school] work on the weekends," he could not allocate additional time to this task.[90]

On August 28, 1998, Fallon noted in a memorandum that she had spoken with Dr. Perez-Guerra, and that he

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[84] Goodwill Aff. at 3.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 5.

[88] *Id.*

[89] *Id.*

[90] *Id.*

told her Plaintiff had either no sleep apnea or only a trivial amount of sleep apnea.[91] He also informed her that Plaintiff probably had narcolepsy and that his differential diagnosis at that point would be sleep deprivation syndrome.[92] Dr. Perez-Guerra recommended that Plaintiff sleep seven to eight hours per night for the next three weeks and then undergo a follow-up sleep study.[93] If abnormal at that time, he would be treated for narcolepsy.[94] In a memorandum to her file, Fallon wrote, "In light of this finding, I feel very strongly that Mr. Goodwill should be encouraged to take a leave of absence to evaluate these medical problems."[95] Later that same day, Fallon suggested to Plaintiff in person that he take a medical leave of absence to help him overcome his problem.[96]

In early September 1998, Plaintiff was granted a medical leave of absence so that he could resolve his medical problem. On September 23, 1998, after the three weeks of strict rest prescribed by Dr. Perez-Guerra, Plaintiff submitted a request to return to his clinical studies.[97] Fallon met with him Plaintiff to discuss his return as well as the results of his sleep study.[98] According to Fallon,

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[91] Fallon Memorandum to File dated August 26, 1998, Docket Entry No. 58, Exhibit 21; *see also* Deposition of Derrick Goodwill, Docket Entry No. 56, Exhibit E ("Goodwill Depo.") at 36:16-17.

[92] Fallon Memorandum to File dated August 26, 1998, Docket Entry No. 58, Exhibit 21.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Fallon Memorandum to File dated August 28, 1998, Docket Entry No. 58, Exhibit 20.

[97] Fallon Aff. ¶ 12.

[98] *Id.*

Plaintiff's sleep study did not show narcolepsy, but rather was consistent with sleep deprivation syndrome.[99] She recommended to Plaintiff that he alter his sleep habits so he could sleep for longer periods of time during weekday nights.[100] Plaintiff again rejected the idea, explaining that he had to study late on weekday nights because he took care of personal business on weekends.[101] Despite Plaintiff's intransigence on this point, Fallon testified that "[b]ecause Mr. Goodwill stated that he was feeling much better rested, and because his physician confirmed he was doing much better, I cleared him to return to his studies."[102]

With the above evidence in mind, the court finds Plaintiff has failed to show that sleep apnea substantially limited his ability to sleep. First, the evidence reveals that Plaintiff had, at most, only a trivial amount of sleep apnea. Indeed, Dr. Perez-Guerra, his treating physician, did not pursue a diagnosis of sleep apnea, and instead focused on narcolepsy and sleep deprivation syndrome as possible causes of Plaintiff's problem of falling asleep during the daytime.

Second, Plaintiff has not shown he was unable to sleep or was otherwise significantly restricted in the condition, manner, or duration of his ability to sleep as compared to the average person in the general population. *Cf. Pack v. Kmart Corp.*, 166 F.3d 1300, 1306 (10th Cir. 1999) ("While

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[99] *Id.*.

[100] *Id.*

[101] *Id.*

[102] *Id.* Plaintiff confirmed that his condition improved after he began to get more sleep. Goodwill Depo. at 39:14-19.

the evidence showed Pack had episodes of sleep disruption and/or waking without feeling rested during 1994 and January 1995, there is no indication that her sleep problems were severe, long term, or had a permanent impact"). Instead, Plaintiff's failure to get enough sleep was of his own doing; he readily admitted that he chose to study late into the night, thus sacrificing sleep, rather than set aside more time to study on the weekend. The evidence also reveals that Plaintiff experienced his problem only over a short period of time. Indeed, once Plaintiff was able to sleep for eight hours per night over a period of three weeks, his alleged sleep difficulty and concomitant daytime exhaustion apparently disappeared. Moreover, there is also a dearth of evidence that the sleep apnea had a long-term impact on Plaintiff's health or ability to function. Once he returned from his leave of absence, Plaintiff resumed his clerkship rotations without any further problems. Plaintiff testified that he never even took any medication for a sleeping disorder.[103] Instead, Dr. Perez-Guerra merely told him to continue taking his asthma medication, to get an adequate amount of sleep, and to lose some weight.[104]

Plaintiff next claims his sleep apnea substantially limited his ability to concentrate and learn as a medical student. Again, Plaintiff has failed to produce any evidence of such. The only thing Plaintiff has shown is that he chose to stay up late at night studying and that this resulted in feeling tired during the day. Although the record indicates Plaintiff often feli asleep during his

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[103] *See* Goodwill Depo. at 34:3-4.

[104] *Id.* at 35:15-19.

lectures and clinical rotations, he offers nothing more than speculation that sleep apnea caused the problem. This, of course, is not sufficient to withstand summary judgment. *TIG Ins.*, 276 F.3d at 759 (stating that unsubstantiated assertions are not enough to raise a material fact issue for trial). Consequently, he has not made the requisite showing that he had a disability, i.e, that a physical or mental impairment substantially limited his ability to concentrate or learn as compared to the general population.

However, even if Plaintiff did not have an impairment that substantially limited one or more major life activities, he may still be entitled to protection under the ADA if he was "regarded as having such an impairment." 28 C.F.R. § 35.104. "A plaintiff has a 'regarded as' disability if he (1) has an impairment that is not substantially limiting but which the employer perceives as substantially limiting, (2) has an impairment that is substantially limiting only because of the attitudes of others, or (3) has no impairment but is perceived by the employer as having a substantially limiting impairment." *Waldrip*, 235 F.3d at 657.

Plaintiff invokes the third option, contending that even if he did not have an impairment that substantially limited a major life activity, Defendants perceived him as having one.[105] In support of this contention, he claims that upon observing his symptoms and being told of his disability, Defendants treated him differently from others who did not have the disability, and also failed to reasonably accommodate him. There is no support in the record for either contention. First, Plaintiff has not provided any competent summary judgment evidence that Defendants

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[105] Plaintiff's Response at 27-28.

treated other medical students more favorably. With nothing more than Plaintiff's mere speculation about Defendants' intent, no fact issue can be raised on this point.

Second, it is plain that Defendants accommodated Plaintiff in a reasonable manner after suspecting that he may have had a medical problem that affected his clinical performance. After Plaintiff complained to Fallon about feeling fatigued, she took the affirmative step of referring him to Dr. Perez-Guerra for a consultation. When Dr. Perez-Guerra recommended that Plaintiff get eight hours of sleep per night for three straight weeks, Fallon wrote Michael L. Friedland, M.D., Vice-President for Health Affairs and Dean of Medicine, requesting that Plaintiff be given a medical leave of absence to help him resolve the existing problem.[106] In her memorandum to Dr. Friedland, Fallon stated:

> While academic difficulty is not a reason per se for a leave of absence, there is a strong possibility that his difficulties could be related to a medical condition and this needs to be more clearly defined. In addition, it would be extremely difficult to assure increased rest while working on a difficult clinical clerkship.
>
> The Office of Student Affairs is very supportive of Mr. Goodwill's request for a medical leave of absence for up to one year. Mr. Goodwill obviously desires to return to his clinical duties as quickly as possible, which we would also support as long

[106] Memorandum from Fallon to Friedland, Docket Entry No. 58, Exhibit 20.

> [as] he has been cleared by his physician to do so.[107]

After the three-week test period was completed and Dr. Perez-Guerra cleared Plaintiff to resume his clinical studies at the College of Medicine, Fallon immediately reinstated him.[108]

In addition to the utter lack of evidence that Fallon failed to accommodate Plaintiff, there is no evidence demonstrating that the College of Medicine failed in this responsibility.[109] Indeed, Plaintiff admitted that he never specifically asked the College of Medicine to provide him with any accommodations upon his return to the medical school.[110] The Student Handbook clearly required him to do so.[111] Plaintiff's claim that Defendants failed to reasonably accommodate him is not supported in the record.

In conclusion, the court finds that Plaintiff cannot make out a prima facie case of disability discrimination because he has not come forth with any evidence showing he had a "disability" within the meaning of Title II of the ADA. As a result, Defendants' motion for summary judgment should be granted on Plaintiff's ADA claim.

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[107] *Id.*

[108] Fallon Aff. ¶ 12.

[109] Plaintiff has not shown any evidence that Defendants Green or McCallum were even aware of his medical problem, much less that they failed to reasonably accommodate his condition.

[110] Goodwill Depo. at 38:24-39:5.

[111] *See* June 1998 Student Handbook, Docket Entry No. 56, Exhibit D-3 at 11 ("If the candidate does require accommodation, the accommodation must be specifically stated in writing.").

C. State Law Claims Against the Individual Defendants

Plaintiff next asserts state law claims against the individual Defendants for intentional infliction of emotional distress, civil conspiracy, and breach of fiduciary duty. Green, Fallon, and McCallum seek official immunity from these claims.

Under Texas law, government officials are granted immunity from claims that arise from (1) the performance of discretionary duties (2) within the scope of their authority (3) provided the actions are taken in good faith. *Univ. of Houston v. Clark,* 38 S.W.3d 578, 580 (Tex. 2000); *Kassen v. Hatlev,* 887 S.W.2d 4, 9 (Tex. 1994); *City of Lancaster v. Chambers,* 883 S.W.2d 650, 653 (Tex. 1994). To obtain summary judgment on this ground, the Defendants must prove conclusively each element of the affirmative defense. *Clark,* 38 S.W.3d at 580.

An action taken by a public official is "discretionary" if it requires personal deliberation, decision, and judgment; conversely, an action that only requires an official to obey orders or perform a duty over which he has no choice is ministerial. *Chambers,* 883 S.W.2d at 653-54. A public official acts "within the scope of his authority" if he discharges the duties generally assigned to him. *Id.* at 658. With regard to the third element, the court measures good faith against a standard of objective reasonableness without regard to the official's subjective state of mind. Id. at 656. The critical issue is "whether a reasonably prudent official, under similar circumstances, could have believed that his conduct was justified based on the information he possessed when the conduct occurred." *Ballantyne v. Champion Builders, Inc.,* 2004 WL 1533950, No. 02-0260,

at *9 (Tex. July 9, 2004); *see also Clark*, 38 S.W.3d at 584; *Chambers*, 883 S.W.2d at 656.

1. Green

The evidence in the record shows Green developed a remediation plan after Plaintiff failed the Internal Medicine clerkship and also changed Plaintiff's grade from an "F" to an "IP" after he determined Plaintiff was not given sufficient feedback from his preceptors during the clerkship. These actions required Green to exercise discretion in determining what course of action to take regarding Plaintiff's academic status. Further, Green took these actions within the scope of his authority as clerkship coordinator of the Internal Medicine clerkship and faculty member of the College of Medicine.[112]

With regard to the third element, the court finds that Green acted in good faith when he required Plaintiff to retake the clerkship. Pursuant to school policy, if a student fails a clerkship, the department determines whether remediation is appropriate and then makes a recommendation to the SPC.[113] Green clearly abided by this policy by presenting a remediation plan to the SPC that called for Plaintiff to retake the inpatient portion of the clerkship. Given that Plaintiff did not exhibit the skills necessary to

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[112] *See* Affidavit of Jacob Benjamin Green III, M.D., Docket Entry No. 56, Exhibit G ¶ 2 ("All actions I took related to assessing the academic performance and progress of Plaintiff Derrick Goodwill were taken in my capacity as a faculty member of the Texas A&M University College of Medicine and the Texas A&M University System Health Science Center College of Medicine.").

[113] June 1998 Student Handbook, Docket Entry No. 56, Exhibit D-3 at 14.

pass the Internal Medicine clerkship, Green's action was clearly justified under the circumstances and was, therefore, taken in good faith.

Plaintiff also claims that Green acted in bad faith when by initially refusing to change Plaintiff's grade. Plaintiff claims that he informed Green of the procedural defect in his grade in November 1998, and that Green refused to change the grade at this time, submitted a grade of "F" to the SPC, and changed the grade to "IP" only after the SPC placed him on probation.[114] Notwithstanding Plaintiff's subjective belief that Green acted in bad faith by not changing his grade quicker, the court believes he met the requisite standard for showing good faith. The evidence indicates that, in reaching a decision to fail Plaintiff, Green relied on the clinical evaluations of the attending physicians in the clerkship. It also shows that Green told Plaintiff to voice his complaints with these physicians. The court believes that a reasonably prudent official in the same situation could have believed this action was justified under the circumstances.[115]

2. Fallon

Plaintiff alleges Fallon mishandled his grade appeal process by disallowing him to have his chosen representative present during grade appeal proceedings, refusing to

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[114] Goodwill Aff. at 8-9.

[115] Moreover, the record shows that Green did investigate Plaintiff's claim that he did not receive adequate feedback. Green Aff. ¶¶ 5-6. Green determined the claim had merit and, accordingly, changed Plaintiff's grade from an "F" to an "IP" because he felt Plaintiff "deserved the chance to complete the inpatient rotation again with proper guidance." *Id.* ¶ 6.

hear witnesses on his behalf, neglecting to investigate the actions of his preceptors that caused him to receive failing grades in two clerkships, and providing false information about him to the SPC.[116] The court finds that Fallon used discretion in discharging her duties as Assistant Dean of Student Affairs. The evidence in the record indicates she used judgment in advising Plaintiff to take a medical leave of absence and counseling Plaintiff about the grade appeal process. With regard to the second element, Fallon stated in her affidavit that all actions regarding Plaintiff were taken in her official capacity as a faculty member of the College of Medicine.[117]

With regard to the final element, the court is persuaded that Fallon took all actions regarding Plaintiff in good faith. The record shows that she followed school policy in connection with the grade appeals proceedings. Contrary to Plaintiff's exhortations, Fallon was not required to advocate on his behalf at the meetings; instead, her role was merely that of a counselor. Nor was Fallon under an obligation to allow Plaintiff to bring a representative to the meetings, as Plaintiff suggests. In sum, the court finds that a rational official in Fallon's position, who had knowledge of the applicable school policies, could believe that these actions were justified.

3. McCallum

Plaintiff alleges that McCallum wrongfully denied him a due process hearing and appeal of the decisions upholding his failing clerkship grades, acquiesced in the

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[116] *Id.* ¶ 28.

[117] Fallon Aff. ¶ 33.

wrongful actions of Green and Fallon, generally failed to follow school policy, and appointed or permitted Fallon to appoint individuals to the SPC whose conduct formed the basis of his complaint.[118] As with Green and Fallon, the court easily concludes that McCallum's actions concerning Plaintiff were discretionary and within the scope of his authority as Interim Dean of the College of Medicine. The evidence reveals McCallum used judgment in permitting Plaintiff additional time to appeal his failing grades and dismissal, granting Plaintiff a right to appeal his grades, affirming the appeals committees' decisions upholding those grades, and upholding the SPC's recommendation that Plaintiff be dismissed for academic reasons.[119] As to the second element, McCallum testified that all actions he took relating to Plaintiff were in his official capacity as a member of the College of Medicine faculty.[120]

Finally, the evidence shows that all of McCallum's actions were taken in good faith. His action in affirming Plaintiff's failing grades was based on a review of the clinical evaluations, which revealed Plaintiff had severe shortcomings in the clinical setting. Further, nothing in the record indicates that Plaintiff informed McCallum that he believed he was given failing grades due to discriminatory animus. With nothing more to go on beside the clinical evaluations, it is clear McCallum's actions in upholding the grades was justified.

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[118] *Id.* ¶ 30.

[119] McCallum Aff. ¶¶ 3, 8-9, 11.

[120] Affidavit of Roderick E. McCallum, Ph.D., Docket Entry No. 56, Exhibit F.

The court reaches the same conclusion as to McCallum's action in affirming the SPC's recommendation of dismissal. In his letter to McCallum requesting an appeal of his dismissal, Plaintiff alleged that a fundamental misrepresentation of official policy was evident and that significant procedural defects took place in the appeals proceedings.[121] McCallum determined that Plaintiff's claims did not have merit and, accordingly, dismissed him from the College of Medicine. Again, McCallum based his decision on the fact that Plaintiff failed two clerkships while on academic probation. Under school policy, this was sufficient for dismissal.[122] The court finds that a rational official who possessed the same information about Plaintiff's performance in the clerkships could easily come to the conclusion that dismissal was the appropriate course of action. Thus, McCallum actions in this regard were taken in good faith.

The individual Defendants have each proven their affirmative defense of official immunity. Thus, Defendants' motion for summary judgment should be granted on Plaintiff's state law claims.

V. Conclusion

For the reasons set forth above, the court **RECOMMENDS** that Plaintiff's Motion to Strike be **GRANTED IN PART and DENIED IN PART** and that Defendants' Motion for Summary Judgment be **GRANTED**.

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[121] Letter Appealing Dismissal dated December 9, 1999, Docket Entry No. 56, Exhibit D-6.

[122] June 1998 Student Handbook, Docket Entry No. 56, Exhibit D-3 at 15.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties, who have ten days from the receipt thereof to file written objections thereto pursuant to General Order 2002-13. Failure to file written objections within this time period shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas, 77208. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas, 77002.

SIGNED at Houston, Texas, this 29th day of October, 2004.

/s/ Nancy Johnson
NANCY K. JOHNSON
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DERRICK GOODWILL,	§	
Plaintiff,	§	
v.	§	CIVIL NO. H-02-0088
TEXAS A&M UNIVERSITY MEDICAL SCHOOL, RODERICK E. MCCALLUM, KATHLEEN WILLIAMS, BEN GREEN and JOHN DOE,	§	
Defendants.	§	

FINAL JUDGMENT

(Filed Nov. 24, 2004)

In conformity with the Order Adopting Magistrate Judge's Memorandum and Recommendation signed on November 24, 2004, it is hereby **ADJUDGED** that Plaintiff take nothing against the Defendants.

All relief not granted herein is **DENIED.** The parties shall bear their own costs.

THIS IS A FINAL JUDGMENT.

The Clerk will provide a copy of this judgment to all counsel.

SIGNED this 24th day of November, 2004, in Houston, Texas.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20987

DERRICK GOODWILL,

Plaintiff-Appellant,

versus

TEXAS A & M UNIVERSITY MEDICAL SCHOOL, RODERICK E. MCCALLUM, KATHLEEN WILLIAMS, BEN GREEN, and JOHN DOE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC no. 4:02-CV-88

(ON PETITION FOR REHEARING)

(Filed Apr. 8, 2005)

Before WIENER, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

FRAP 3. APPEAL AS OF RIGHT - HOW TAKEN

* * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

* * *

FRAP 4. APPEAL AS OF RIGHT - WHEN TAKEN

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

* * *

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order –

but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DERRICK GOODWILL	§	
Plaintiff	§	
	§	
v.	§	**CIVIL ACTION**
TEXAS A&M UNIVERSITY	§	**NO. H-02-0088**
MEDICAL SCHOOL,	§	
RODERICK E, MCCALLUM,	§	
KATHLEEN WILLIAMS,	§	
BEN GREEN, AND	§	
JOHN DOE	§	
Defendants	§	

PLAINTIFF'S NOTICE OF APPEAL

(Filed Nov. 26, 2004)

Plaintiff, Derrick Goodwill, serves notice that he wishes to appeal the Court's Judgment on Defendants' Motion for Summary Judgment in the above-referenced cause, entered October 29, 2004. Plaintiff hereby appeals to the United States Court of Appeals for the 5th Circuit.

Respectfully submitted,

Law Offices of Gary L. Bledsoe & Associates

By: /s/ Gary L. Bledsoe

Gary L. Bledsoe
State Bar No.: 02476500
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Telephone: (512) 322-9992
Facsimile: (512) 322-0840

Certificate of Service

I hereby certify that a true and correct copy of the attached document has been sent this day via First Class U.S. mail to opposing counsel at the address indicated below.

Peter Plotts, Assistant Attorney General
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

November 22, 2004

/s/ Walter C. Muse, Jr.
Walter C. Muse, Jr.